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IN THE

Supreme Court of the United States

GEORGE PATAKI,
Governor of The State of New York, *et al.*,
Petitioners,

v.

THE SARATOGA COUNTY
CHAMBER OF COMMERCE, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF *AMICUS CURIAE* OF THE UNITED SOUTH AND EASTERN TRIBES, INC., IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF *AMICUS CURIAE*

The United South and Eastern Tribes, Inc. ("USET") is a non-profit inter-tribal organization founded in 1968. USET is dedicated to promoting Indian leadership, improving the quality of life for American Indians, and protecting Indian rights and natural resources on tribal lands. [1] USET includes twenty-four federally recognized tribal governments from an area stretching from Maine to Texas.[2]

USET has an interest in the issues presented in this case. All of its members have federally protected sovereign immunity and will be injured if state courts force them to a choice between asserting their sovereign immunity and protecting their other significant interests. In addition, many of USET's members have entered into tribal-state gaming compacts in effect under IGRA and have invested resources into developing federally approved gaming on tribal lands. The state court's assertion that the validity of such a compact

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1 Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, A*micus Curiae* states that no party authored this brief in whole or in part, and no person or entity, other than A*micus Curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

2 The members of USET are: the Eastern Band of Cherokees, the Mississippi Band of Choctaws, the Miccosukee Tribe, the Seminole Tribe of Florida, the Chitimacha Tribe of Louisiana, the Coushatta Tribe of Louisiana, the St. Regis Band of Mohawk Indians, the Penobscot Indian Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, the Tunica-Biloxi Indians of Louisiana, the Poarch Band of Creek Indians, the Narragansett Indian Tribe, the Mashantucket Pequot Tribe, the Wampanoag Tribe of Gay Head (Aquinnah), the Alabama-Coushatta Tribe of Texas, the Oneida Indian Nation, the Aroostook Band of Micmac Indians, the Catawba Indian Nation, the Jena Band of Choctaw Indians, the Mohegan Tribe of Connecticut, and the Cayuga Nation. See 67 Fed. Reg. 46328 (July 12, 2002) (list of federally recognized tribes published pursuant to 25 U.S.C. § 479a-1).

is a matter of state concern, which can be adjudicated without considering either the tribal or federal interests at stake, undermines the comprehensive regulatory scheme established in the Indian Gaming Regulatory Act ("IGRA") and threatens the federal protection of Indian sovereignty over tribal lands.

USET respectfully submits this brief to address the federal protection of Indian sovereignty and the federal and tribal interests that were ignored by the New York Court of Appeals.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE WRIT OF CERTIORARI

The issue in this case is the supremacy of federal law. The object of this litigation is to interfere with and, indeed, to eliminate Indian casino gaming in New York. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 209-11, 221 (1987), this Court held that a state, such as New York, that permits gaming in some form by non-Indians, has no authority to regulate or limit gaming on Indian land. In the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et. seq.*, (2003) Congress provided that a state must negotiate a tribal-state Compact to allow casino and other Class III gaming activities on Indian lands if the state "permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d) (2003). Here, New York and the Mohawks entered into such a Compact in 1993; it became effective upon approval by the Secretary of the Interior and publication in the federal register.[3] The Court of Appeals held the 1993 Tribal-State Compact ("Compact") invalid, in the absence of both the Mohawks and the United States.

As described by the Court of Appeals, "[p]laintiffs are legislators, organizations and individuals opposed to casino

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[3] Notice of Approved Tribal-State Compact, 58 Fed. Reg. 65272 (1993).

gambling." *Saratoga County Chamber of Commerce, Inc. v. Pataki* (App. A, 2a).[4] Plaintiffs claimed that the Compact authorizing Mohawk gaming under IGRA was invalid, because the governor had no authority to execute a Compact without legislative approval. Plaintiffs sought and obtained a ruling that all parties before the court believed would result in the closure of the casino. *Saratoga County Chamber of Commerce v. Pataki*, New York Court of Appeals, Transcript of Oral Argument, May 6, 2003 ("Oral Arg.Tr.") (USET App. A, 5a, 18a, 43a).[5]

Plaintiffs also sought a ruling that Class III tribal gaming violates the New York Constitution. As framed by the plaintiffs in Action No. 1, the questions presented to the Court of Appeals included: "did the Compact . . . violate Article I, § 9 of the [New York] Constitution prohibiting commercial gambling?" and, "[i]n light of the 10th Amendment to the U.S. Constitution, . . . should . . . [IGRA] be read as overriding New York's constitutional and statutory law and public policy against gaming." *Saratoga County Chamber of Commerce, Inc. v. Pataki*, New York Court of Appeals, Brief for Plaintiffs-Respondents in Action No. 1 (January 27, 2003) at 12. *See also* Oral Arg. Tr. (USET App. A, 25a) (plaintiffs seek ruling that gaming violates state constitution, because otherwise the legislature likely will ratify the Compact); *id.* at 25a-26a (if plaintiffs had a "magic wand," they would "close them down"); *id.* at 37a (plaintiffs claim New York Constitution bars legislature from remedying separation of powers problem by ratifying the Compact).[6]

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[4] References to App. A or App. B will be to the Appendix to the Petition for Certiorari filed by the Attorney General of New York.

[5] References to USET App. are to the Appendix attached to this Brief A*micus Curiae* filed by the United South and Eastern Tribes, Inc. in support of the Petition for Certiorari.

[6] The Appellate Division found that the gambling authorized by the Compact was "the antithesis of the highly restricted and 'rigidly

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The New York Attorney General argued, *inter alia*, that the tribe's sovereign immunity barred litigation of the suit. Despite its conclusion that the ruling it affirmed "speaks to the legality of the casino's operation, and thus affects the rights of each party to this suit," (App. A, 8a), the Court of Appeals held that the lower courts were empowered, under the state indispensable party rule, N.Y.C.P.L.R. 1001 (McKinney 1976), to proceed with the litigation in the tribe's absence. The court deemed the tribe's absence "excused," because the tribe could have waived its federal sovereign immunity and appeared as a party. (App. A, 23a). The court found that "IGRA does not preempt State law governing which State actors are competent to negotiate and agree to gaming compacts," (App. A, 25a), and found the issue too important to "permit the Tribe's voluntary absence to deprive these plaintiffs (and in turn any member of the public) of their day in court." (App. A, 22a).

The Court of Appeals' ruling purports to invalidate a federally approved agreement between an Indian tribe and a state, in the absence of both the tribe and the federal government. This Court should grant certiorari, because the Court of Appeals' rejection of the tribe's sovereign immunity conflicts with this Court's decision in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986). *Three Affiliated Tribes* held that where the tribe's interest is federally protected, a state may not require

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regulated' . . . forms of gambling permitted by the N.Y. Constitution and statutory law and New York's established public policy disfavoring gambling." (App. B, 71a). The New York Court of Appeals declined to address the issue, citing another case pending in the lower courts in which the issue was squarely presented. (App. A, 29a). The dissenting judges would have addressed the state constitutional issue and found that IGRA preempts both the state constitution's anti-gaming provision and the "policy choices" the majority found that the governor ignored in signing the Compact. (App. A, 54a-61a) (Read, J., dissenting).

the tribe to waive its federal law sovereign immunity in order to protect that interest.

Intertwined with the sovereign immunity issue is an important federal question this Court should resolve, whether a state court adjudication of the validity of a federally approved gaming compact interferes with the comprehensive regulatory scheme set out in IGRA. *See Three Affiliated Tribes*, 476 U.S at 889-90 (Indian sovereignty and federal preemption are two ways of addressing the same supremacy issue). The state court's insistence on providing the plaintiffs a forum to decide a question of "State law" demonstrates its refusal to accept the preemptive force of IGRA. The state law issue arose only because a federal law – IGRA – conferred authority on the state to participate in the regulation of tribal gaming. Contrary to the Court of Appeals' view, there is no purely state law question in a challenge to the validity of a federally approved Tribal-State Gaming Compact.

This case is the appropriate vehicle in which to address the significant federal supremacy issues presented here. Although, in the absence of the tribe, no party had an interest in arguing that the state court adjudication interfered with the comprehensive federal regulation of Indian gaming set out in IGRA,[7] the Court of Appeals nevertheless addressed both the issue of sovereign immunity and the proper forum for a challenge to a federally approved gaming compact. (App. A, 23a, 25a). There will continue to be cases in which state courts adjudicate the validity of a tribal-state gaming compact in the absence of the tribe. Because the tribe will not be present to raise the federal issues, there may not be other

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[7] The New York Attorney General argued in the lower state courts that federal law preempted the state court action, but did not press that argument before the Court of Appeals. The Oneida Indian Nation filed a brief A*micus Curiae* in the Court of Appeals addressing the preemption issue. *See Saratoga County Chamber of Commerce v. Pataki,* New York Court of Appeals, Brief for Amicus Curiae Oneida Indian Nation (December 17, 2002) at 12-25.

cases in which the federal supremacy issues are as clearly presented as they are here.

REASONS FOR GRANTING THE WRIT

I. The New York Court of Appeals' decision that the Mohawk Tribe must waive its sovereign immunity in order to protect its interest in a federally approved gaming compact violates the Supremacy Clause

Federal law recognizes and protects tribal sovereignty. *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980). "The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. *See also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Sovereign immunity is not just a rule that prevents exercise of jurisdiction over the immune party. It bars a court from adjudicating significant interests of the immune party. Sovereign immunity is not subject to a balancing test, such as that used by the Court of Appeals when it permitted a state law indispensable party test to take precedence over federally protected sovereign immunity. (App. A, 22a) (under N.Y.C.P.L.R. 1001, factors favoring judicial review outweigh tribe's sovereign immunity).

Courts consistently have held that, where litigation affects significant interests of a sovereign, the litigation may not proceed. "The desirability for complete settlement of all issues between parties must, we think, yield to the principle of

immunity." *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940) (tribal immunity bars cross-claim against the United States, acting on behalf of tribe). Sovereign immunity trumps other considerations, even the absence of an alternate forum.[8] *See Oklahoma Tax Comm'n*, 498 U.S. at 514 (state may require tribe to collect tax on cigarettes sold to non-Indians, but sovereign immunity bars suit to recover tax from tribe); *see also Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) (state indispensable to suit to force Secretary of Interior to publish notice of approval of gaming compact, even though dismissal would leave tribe without a remedy); *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 547-48 (2d Cir. 1991) (tribe indispensable to suit to compel renewal of leases to which tribe was a party); *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 56 (D.D.C. 1999) (state indispensable to tribe's suit against Secretary of Interior, even though court "aware that the consequence of today's decision is that the [tribes] will have no access to the federal courts by which to vindicate their rights"); *Srader v. Verant*, 964 P.2d 82 (N.M. 1998) (tribes indispensable to suit seeking to prevent financial institutions from providing funding to the tribes' gaming operations). "[W]hen . . . a necessary party . . . is immune from suit, 'there is very little room for balancing of other factors.'" *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989). *See also Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986) (immunity is "one of those interests 'compelling by themselves'").

This Court need not decide whether federal law bars every state action that affects a significant tribal interest, although there would be compelling arguments in favor of such a ruling. The issue presented here is narrower -- whether

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[8] As demonstrated below, there was an alternate forum for plaintiffs' challenge. *Infra* at pp. 15-16.

a state, by application of its state indispensable party rules, may force a tribe to waive its sovereign immunity in order to protect its sovereignty over gaming activities conducted on Indian land. The answer to the question is compelled by this Court's decision in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1976), holding that where the tribe's interest is federally protected, a state may not require the tribe to choose between its federal law sovereign immunity and its other federally recognized interests.

The interests of the tribe at stake in this litigation are both significant and federally protected. The tribe, like any party to a contract, has an interest in a proceeding challenging the validity of the Compact. *See Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or contract all parties who may be affected by the determination of the action are indispensable."), *cited in Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1156-57 (9th Cir. 2002) (tribe indispensable to suit challenging hiring preference required by lease with tribe); *and cited in United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 481 (7th Cir. 1996) (tribe indispensable to suit to invalidate contracts to which tribe was party). Under the state court decision, the tribe will lose the benefit of the services the state agreed in the compact to supply to the casino. Oral Arg. Tr. (USET App. A, 8a) (state's view is that "if the Compact is voided, the state . . . officials . . . would be unable to perform their functions").[9]

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[9] Under the Compact, the tribe is entitled to seek arbitration and, if necessary, to sue the state in federal district court if the state does not provide the services agreed to in the Compact. Record on Appeal, at 1323-1325. Although the state court decision cannot be *res judicata* against the tribe, a federal court faced with a tribal action to enforce the

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There can be no suggestion that the State, as the other party to the contract, represents the interests of the tribe. The State had no interest in removing this case to federal court, where federal indispensable party rules would have compelled dismissal. *See supra* at pp. 6-7; *infra* at pp. 10-11. The State owes no trust obligation to the tribe.[10] Fundamentally, the interests of the tribe and the State are in tension, if not in conflict; if the tribe were required to renegotiate a gaming Compact in order to protect its multi-million dollar investment in its casino, the terms of the Compact might be considerably less favorable to the tribe. *See, e.g., Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49 (D.D.C. 1999) (after original Compact declared invalid, state legislature required that Compact include high revenue sharing and regulatory fees provisions; Secretary of Interior did not provide remedy and federal court could not hear tribe's suit because of state's sovereign immunity).

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Compact likely will feel constrained to avoid inconsistent judgments and defer to the state court judgment that the Compact is invalid.

[10] The Court of Appeals cited four cases as holding that "an Indian Tribe's absence due to sovereign immunity should not result in dismissal." (App. A, 23a, n.10). One of those cases was a state court decision that followed the reasoning of the Appellate Division in this case. *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W. 2d 474 (Wis. Ct. App.), *review denied*, 655 N.W. 2d 129 (Wis. 2002). The three federal cases were challenges, under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et. seq.* (2003) ("APA"), to decisions of the National Indian Gaming Commission ("NIGC") and the Secretary of the Interior allowing gaming under IGRA. The courts found that the interests of the NIGC and the Secretary of the Interior were substantially similar, if not identical, to those of the tribe. *Kansas v. Norton*, 249 F.3d 1213, 1227 (10th Cir. 2001); *Sac And Fox Nation v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001); *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1118-19 (E.D. Cal. 2002) (citing federal government's trust obligations to tribe).

The tribe's interest in this case is much greater than that of a party to a commercial contract. In IGRA, Congress affirmed "the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands." S. Rep. No. 446, 100th Cong., 2d Sess., at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3075. The Court of Appeals' decision directly infringes on those sovereign rights and on the federal interest in preserving them.

There is no doubt that plaintiffs in this case, or other opponents of tribal gaming, will use this ruling to assert that Indian gaming is illegal. *See, e.g.,* Letter from Daniel T. Warren to Philip N. Hogen, Chairman, National Indian Gaming Commission (June 20, 2003) (USET App. B, 47a) (urging the NIGC to close the Mohawk and Oneida casinos, in light of the Court of Appeals' decision in this case). One federal court has held that a state court decision invalidating a gaming Compact also renders gaming illegal under IGRA. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997) (Compacts not valid under IGRA because not valid as a matter of state law). *But see id.* at 1552, 1556 (United States asserts that Compact remains valid under IGRA because it is "in effect" once Secretary of Interior approves it; only way to challenge an approved Compact is to ask the Secretary to withdraw his approval). Whether or not the state court judgment ultimately results in loss of federal approval, the immediate impact of the declaration is to impair the tribe's ability to enter into continuing business relations and thus to impair the tribe's ability to continue its federally approved gaming.

Federal courts uniformly agree that sovereign immunity bars a court from litigating the validity of a gaming Compact in the absence of either of the parties to the Compact, even if the challenge is made, under state law, to the legality of the conduct of state officials. *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (tribe indispensable to suit asserting that governor had

no authority to enter into gaming compact); *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1498-99 (D.C. Cir. 1995) (state indispensable to suit asserting that Compact was valid under federal law because it had been submitted to Secretary of Interior for approval); *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 56 (D.D.C. 1999) (state indispensable to suit challenging Secretary of Interior's refusal to exercise authority to disapprove provisions of compact as contrary to IGRA). At least one state court has reached the same result, finding a tribe indispensable to a suit challenging the governor's authority under state law to enter into a gaming Compact. *State ex rel. Coll v. Johnson*, 990 P.2d 1277 (N.M. 1999). Two state courts, the Court of Appeals in this case and one other, have ruled, under state indispensable party rules, that a challenge to the validity of a gaming compact could go forward in the absence of the tribe. *See Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W. 2d 474, 486 (Wis.Ct. App.), *review denied*, 655 N.W. 2d 129 (Wis. 2002).[11]

This Court should grant certiorari to resolve the confusion among state courts over their ability to utilize a state indispensable party rule to require a tribe to choose between its federally protected sovereign immunity and other federally protected interests. In *Three Affiliated Tribes*, this

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[11] Two other state court decisions have proceeded, in the absence of the affected tribe, to address the authority of the governor to enter into a gaming compact, but they are procedurally distinguishable from this litigation. *State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan.1992) was a mandamus/quo warrant action challenging the authority of the governor to enter into the compact. The action was brought before the compact was submitted to the Secretary for approval. *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995), issued mandamus, in the absence of the tribe, to prohibit the governor from implementing compacts he had signed. The New Mexico Supreme Court later distinguished *Clark* based on the peculiarities of mandamus, and found that the tribe's sovereign immunity required dismissal of a suit to declare gaming compacts invalid. *State ex rel. Coll v. Johnson*, 990 P.2d 1277 (1999).

Court rejected a state law that required a tribe to waive its sovereign immunity in all civil disputes as a condition of the tribe's right to sue non-Indians in state court. The Court found the state interest in its jurisdictional scheme "overshadowed by longstanding federal and tribal interests." 476 U.S. at 890. *See also Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996) (state *res judicata* rules generally left to the state, but application here deprived individuals of due process).

This Court should apply *Three Affiliated Tribes* to the state jurisdictional rule at issue here. If the balancing of interests required under N.Y.C.P.L.R. 1001 requires the tribe to waive its sovereign immunity in order to protect its sovereignty over its own lands, that rule is "overshadowed by longstanding federal and tribal interests," 476 U.S. at 890, and is preempted by federal law.

II. The New York Court of Appeals' conclusion that the public interest compelled it to provide a forum for resolution of this private litigation ignores the preemptive force of IGRA and the availability of other federal forums.

The state court strained its own indispensable party rules in order to provide a forum for the plaintiffs to challenge Indian gaming. Ignoring state precedent that a party to a contract is indispensable to a suit challenging the contract,[12] the state court decided to proceed without the tribe, because otherwise "no member of the public will ever be able to bring this constitutional challenge." (App. A, 21a). The state court's assertion of the public interest in providing a forum

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[12] *In re Application of McQuay Group*, 87 A.D. 2d 507, 447 N.Y.S.2d 473 (N.Y. App. Div. 1st Dep't 1982) (in an action to set aside a contract, the parties to the contract are indispensable).

for this private suit is both factually wrong and ignores the preemptive force of IGRA.

IGRA is a detailed and comprehensive federal regulatory scheme, intended "to expressly preempt the field in the governance of gaming activities on Indian lands." S. Rep. No. 446, 100th Cong., 2d Sess., at 6 (1988) *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076. Congress' intent was to promote tribal economic development, self-sufficiency, and strong tribal governments, to shield gaming from organized crime and other corrupting influences, and to establish federal standards and an independent Federal regulatory authority for gaming on Indian lands. 25 U.S.C. § 2702 (1) - (3) (2003).

IGRA attempts to encourage cooperation between tribal and state governments in the regulation of Indian casino gaming. S. Rep. No. 446, 100th Cong., 2d Sess., at 6, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3077. IGRA's compact requirement does not cede to the states the authority to regulate Indian gaming. Under IGRA, all of the final decision-makers are federal.[13]

A tribal-state gaming compact is solely a creature of the federal law creating tribal-state gaming compacts. Once federal approval of gaming has been given on the basis of the compact, the compact cannot be removed without disrupting the federal scheme. The validity of a federally approved gaming compact, therefore, is a federal question that must be decided, under federal law, in a procedure consistent with the

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[13] *See* 25 U.S.C. § 2715, 2710(e) (2003) (Chairman of NIGC must approve tribal gaming ordinance); *id.* § 2710(d)(8) (Secretary of Interior must approve tribal-state gaming compact); *id.* § 2713 (Chairman of NIGC may levy fines and issue order closing gaming in violation of IGRA). If the tribe and the state are unable to agree on a compact, the Secretary of the Interior may approve Indian gaming subject to regulations prescribed by the Secretary under IGRA. Class III Gaming Procedures, 64 Fed. Reg. 17535 (1999), 25 C.F.R. §§ 291.1-291.15 (promulgated pursuant to 25 U.S.C. § 2710 after this Court ruled that the tribe may not sue the state for failure to negotiate in good faith).

federal regulatory scheme.[14] *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1055-56 (compact dispute between Band and State presents federal question; not state law question because compacts are created and defined by IGRA); *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996) (IGRA completely preempts state law challenges within its scope; state law challenges to conduct of lawyers in gaming license process are federal claims); *Narragansett Indian Tribe v. Rhode Island*, C.A. No. 94-0618-T, C.A. No. 94-0619-T, C.A. No. 95-0034-T, 1996 U.S. Dist LEXIS 11472 (D.R.I. Feb. 13, 1996) (unreported) (validity of compact under IGRA is a federal question; state law may be applied when the Compact has not been federally approved); *Mashantucket Pequot Gaming Enterprise v. Kennedy*, No. 116860, 2000 Conn. Super. LEXIS 679 (Conn. Super. Ct. Mar. 14, 2000) (unreported) (Tribal-State gaming compact entered under IGRA preempts state law regarding extension of credit for gambling).

The plaintiffs and the state court treat the issue of the validity of the Compact as if it could be surgically removed from the IGRA scheme without impacting that scheme. They ignore the fact that federal approval of Indian casino gaming assumes the existence of the Compact. By invalidating the Compact, the state court has confronted the National Indian Gaming Commission ("NIGC") and, potentially, a federal court with the questions whether the state court decision requires closure of the casino, or whether gaming

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[14] Even without IGRA, the validity of a compact between two sovereigns, the state and the tribe, would present a federal question. *See* S. Rep. No. 446, 100th Cong., 2d Sess., at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 ("the compact process is a viable mechanism for setting various matters between two equal sovereigns"). *See also West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts.")

nevertheless should continue, without the state support and regulation on which federal approval was based. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997), (discussed *supra* at p.10). The fact that either choice interferes with the federal scheme illustrates the fundamental flaw in the state court's premise – that the public interest in resolution of the issue outweighs the federal and tribal interests that are impacted by, but not represented in the state court action.

The absence of a forum for this private suit is not an accident. Congress enacted IGRA fully aware that tribes cannot be sued without congressional or tribal consent. IGRA does not provide for individuals to bring any suit affecting Indian gaming. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1049 (11th Cir. 1995) (individual has no cause of action under IGRA); *American Greyhound Racing, Inc. v. Hull*, 146 F.Supp.2d 1012, 1053 (D. Ariz. 2001), *rev'd on other grounds*, 305 F.3d 1015 (9th Cir. 2002) (same). It does not give the state authority to regulate or enjoin Indian gaming, other than any regulatory authority agreed to by the tribe in the compact. *Florida v. Seminole Tribe*, 181 F.3d 1237, 1248 (11th Cir. 1999) (state may not sue to enjoin gaming in the absence of a compact); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1059-60 (9th Cir. 1997) (same); 25 U.S.C. § 2710(d)(7) (2003) (state may sue in federal district court only to enforce the provisions of a tribal-state compact).

IGRA provides a comprehensive regulatory structure, designed to balance the interests of the states, the tribes and the federal government. *See* S. Rep. No. 446, 100th Cong., 2d Sess., at 3, 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3073, 3075. A private suit, under state law, challenging the validity of a federally approved gaming compact interferes with the balance of interests Congress struck in IGRA and, therefore, is preempted by federal law. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348, 351 n.6 (2001) (private suit challenging "fraud-on-the-FDA"

conflicted with "delicate balance of statutory objectives" in the Medical Device Amendments Act, 21 U.S.C. § 301, which gives enforcement authority only to federal government).[15]

The plaintiffs in this case had other options to challenge the Governor's authority to enter into a Compact without legislative approval. As the Court of Appeals noted, the Governor's action in signing the Compact was known to the public. Oral Arg. Tr. (USET App. A, 29a). The plaintiffs could have urged the Secretary of the Interior not to approve the Compact and could have sought APA review of his decision. *See Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084 (E.D. Cal. 2002) (plaintiffs card clubs and charities could seek review of Secretary's approval of gaming compact under APA). Instead, the plaintiffs waited six years to bring their challenge. By that time, federal approval had been granted, the federal regulatory scheme governing Mohawk casino gaming had been set in motion, and the multi-million dollar casino had been constructed. Even at the late date on which they commenced this suit, the plaintiffs could have requested that the Secretary reconsider his approval of the Compact, or could have requested that the NIGC order the casino closed. *See* 25 U.S.C. § 2713 (review of Commission's closure order in federal district court).

This Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), striking down IGRA's provision for a tribe to sue a state that fails to negotiate in good faith, gave the states an ability to block or delay Indian gaming that

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[15] *Buckman* was decided under rules less weighted toward preemption than those applied in cases involving Indian tribes. Where Indian interests are at issue, a finding of federal preemption does not depend on expressed Congressional intent, but on whether "[s]tate jurisdiction . . . interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

was not intended by Congress. States have exploited the leverage resulting from the unintended asymmetry in IGRA to obtain financial concessions from tribes. *See supra* p. 9 (discussing *Pueblo v. Sandia v. Babbitt,* 47 F. Supp 2d 49 (D.D.C. 1999)). If the decision of the New York Court of Appeals is left standing, the asymmetry will be compounded. Allowing private parties to invalidate an existing compact, on state law grounds, in the absence of the tribe, would force tribes to renegotiate existing compacts on terms set by the state or face closure of a tribal casino that was built at great expense and has been ongoing for years with full federal approval.

The lower courts are in disarray over the proper forum for and the relevance of a state law challenge to a gaming Compact on which ongoing federally approved gaming is being conducted. *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1026 (9th Cir. 2002) (state separation of powers and state constitutional challenges to governor's authority to renew gaming compacts, brought in state court and removed to federal court, cannot be heard in absence of tribe); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997) (giving effect to state court ruling that gaming compact invalid; result is that gaming is illegal under federal law); *id.* at 1552, 1556 (United States asserts that compact remains valid under IGRA because it is "in effect" once Secretary of Interior approves it; only way to challenge an approved compact is to ask the Secretary to withdraw his approval, with review under the APA); *Narragansett Indian Tribe v. Rhode Island*, C.A. No. 94-0618-T, C.A. No. 94-0619-T, C.A. No. 95-0034-T,1996 U.S. Dist LEXIS 11472, at *6-7 (D.R.I. Feb. 13, 1996) (unreported) (validity of compact under IGRA is a federal question); *Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995) (compact approved by Secretary of Interior cannot be invalidated on basis of subsequent challenge to governor's authority), *aff'd,*77 F.3d 479 (5th Cir. 1996); *Dairyland Greyhound Park, Inc. v. McCallum*, 655 N.W.2d 474, 486 (Wis. Ct. App.), *review denied*, 655 N.W. 2d 129 (Wis. 2002) (state court can hear state constitutional

challenge to gaming compacts, in absence of tribe, despite recognition that "the tribes may be in a much better position than the Governor to advocate the supremacy of federal law in constraining a state's ability to curtail Indian gaming once Compacts have been entered into"); *Sarratoga County Chamber of Commerce v. Pataki*, (App. A 2a) (declaring Compact invalid under state law, on the assumption that declaration will undermine federal approval of the gaming, but without addressing that issue); *State ex rel. Coll v. Johnson*, 990 P.2d 1277 (N.M. 1999) (tribe indispensable to state law challenge to legality of legislation authorizing gaming compacts).

This Court should grant certiorari to clarify for the lower courts, state and federal, that a challenge to a federally approved Tribal-State gaming compact presents a federal question that must be addressed in a forum consistent with IGRA and that may be resolved only after consideration of all of the interests at stake: tribal, federal and state.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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